Office-Supreme Court, U.S.
FILED
MAY 11 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1509

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CHARLES THONE, Governor of the State of Nebraska, PAUL L. DOUGLAS, Attorney General for the State of Nebraska and DONALD L. KNOWLES, County Attorney for the County of Douglas, State of Nebraska,

Appellants,

vs.

WOMEN'S SERVICES, P.C., a Nebraska Professional CORPORATION, WILLIAM G. OTT, M.D. and ELIZABETH F.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION TO AFFIRM

JUDITH LEVIN
RABINOWITZ, BOUDIN, STANDARD,
KRINSKY & LIEBERMAN, P.C.
30 East 42nd Street
New York, New York 10017
(212) OX 7-8640

Attorneys for Appellee
Elizabeth F.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
MOTION TO AFFIRM	1
STATEMENT OF THE CASE	5
SUMMARY OF ARGUMENT	6
ARGUMENT	8
I. THE COURT BELOW PROPERLY SUBJECTED THE STATUTORY ROADBLOCKS TO FIRST TRIMESTER ABORTION TO RIGOROUS SCRUTINY	8
A. State Regulations Which Interfere With First Trimester Abortions Must Be Subjected to Rigorous Judicial Scrutiny	8
B. This Court's Decisions on Minors' Rights to, and Medicaid Funding for, Abortions Signal No Retreat from the Strict Standard of Review Required in This Case	12
C. Neither Confusion nor Conflict Exists in the Courts Over the Proper Standard of Review . . .	23

Page

II. THE TRIAL COURT'S FINDINGS OF FACT ARE NOT CLEARLY ERRONEOUS, ARE NOT CHALLENGED AS SUCH BY APPELLANTS, AND SHOULD NOT BE REVIEWED BY THIS COURT 26

III. ABSTENTION IS MANIFESTLY IMPROPER IN THIS CASE . . . 29

A. The Abstention Doctrine Should Rarely Be Invoked 30

B. Appellants' Interpretation Is Patently Absurd and No State Court Would Adopt It 33

CONCLUSION 36

TABLE OF AUTHORITIES

Cases	Page
Akron Center for Reproductive Health, Inc. v. City of Akron, 479 F.Supp. 1172 (N.D.Ohio 1979)	24,25
Baggett v. Bullitt, 377 U.S. 360 (1964)	31
Bellotti v. Baird, 428 U.S. 132 (1976)	31,32
Bellotti v. Baird, 443 U.S. 622 (1979)	15,17
Bigelow v. Virginia, 421 U.S. 809 (1975)	10
Brown v. Chote, 411 U.S. 452 (1973)	21
Carey v. Population Services International, 431 U.S. 678 (1977)	10,16
Charles v. Carey, 627 F.2d 772 (7th Cir. 1980)	23,28
Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976)	30
Colorado Springs Amusements, Ltd. v. Rizzo, 428 U.S. 913 (1976)	20

Cases (continued) Page

County of Allegheny v. Frank Mashuda Co., 360 U.S. 185 (1959) 30

Doe v. Bolton, 410 U.S. 179 (1973) 10

Fusari v. Steinberg, 419 U.S. 379 (1975) 20

Gary-Northwest Indiana Women's Services, Inc. v. Orr, 49 U.S.L.W. 3806 (April 27, 1981) 19-21

Harris v. McRae, ___ U.S. ___, 100 S.Ct. 2671 (1980) . . . 13-15

Harris County Commissioners Court v. Moore, 420 U.S. 77 (1975) 31,35

H.L. v. Matheson, 49 U.S.L.W. 4255 (March 24, 1981) . . . 17,18

Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. 173 (1979) . . 22

Kusper v. Pontikes, 414 U.S. 51 (1973) 31,33

Lake Carriers Association v. MacMullen, 406 U.S. 498 (1972) . 32

Maher v. Roe, 432 U.S. 464 (1977) 13-15

Cases (continued) Page

Mahoning Women's Center v. Hunter, 610 F.2d 456 (6th Cir. 1979), vacated and remanded on other grounds, ___ U.S. ___, 65 L.Ed.2d 1110 (1980) 23,25

Mandel v. Bradley, 432 U.S. 173 (1977) 20,22

Margaret S. v. Edwards, 488 F.Supp. 181 (E.D.La. 1980) . . 24

Planned Parenthood League of Massachusetts v. Bellotti, 641 F.2d 1006 (1st Cir. 1981) . 23

Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976) 10,11,16

Planned Parenthood of Memphis v. Alexander, No. 78-2310 (W.D.Tenn., March 23, 1981) . 24,25

Procunier v. Martinez, 416 U.S. 396 (1974) 32,35

Railway Express Agency v. U.S., 7 L.Ed.2d 432 (1962) 21

Robb v. Connolly, 111 U.S. 624 (1884) 33

Roe v. Wade, 410 U.S. 113 (1973) . . . . . passim

MOTION TO AFFIRM

Appellee Elizabeth F., plaintiff below, respectfully moves pursuant to Rule 16.1 of the Rules of this Court for summary affirmance of the judgment of the Eighth Circuit Court of Appeals appealed from insofar as that judgment affects her and the class of women she represents. The Court of Appeals unanimously affirmed the judgment of the District Court that certain provisions of a Nebraska abortion control statute, which provide criminal penalties for non-compliance, unduly burdened the fundamental right to choose abortion in violation of the Fourteenth Amendment's Due Process Clause.[1/]

1/ The Court of Appeals decision is reported at 636 F.2d 206. The opinion of the District [footnote continued]

There are three, and only three, rulings before this Court which affect Elizabeth F. and the class of women she represents. First, the Court of Appeals refused to abstain from deciding the constitutionality of the definition of informed consent and reporting requirements. 2/ Second, the Court of Appeals held unconstitutionally burdensome the prohibition in Neb. Rev. Stat. §28-327 against performing an abortion without first securing the patient's

---

[footnote 1 continued]

Court is reported at 483 F.Supp. 1022. For this Court's convenience, appellee cites the opinions below to the appendix to appellants' jurisdictional statement [hereinafter "App."].

2/ The Court of Appeals also affirmed the District Court's judgment that the reporting requirement was unconstitutionally void for vagueness. App. at 67, 39-41. Appellants, however, do not contest that ruling in their jurisdictional statement.

informed consent, defined in §28-326(8) to require, in relevant part,

> ...a written statement, voluntarily entered into by the person upon whom an abortion is to be performed, whereby she specifically consents to such abortion. Such consent shall be deemed to be an informed consent only if it affirmatively appears in the written statement that the person upon whom the abortion is to be performed has been advised (a) of the reasonably possible medical and mental consequences resulting from an abortion, pregnancy, and childbirth, ...Such statement shall bear the signature of the person upon whom the abortion is to be performed and be signed by the attending physician.

Finally, the Court of Appeals struck down §28-327's mandatory forty-eight hour waiting period "between the expression of informed consent and the

actual performance of the abortion." 3/

The judgment below rests on the clearly established principles of this Court that states may not enact regulations which directly interfere with a woman's right to obtain an abortion in the first trimester of pregnancy unless the regulation is narrowly tailored to meet a compelling state interest. Appellee urges this Court to affirm

---

3/ The Court of Appeals also held unconstitutional Nebraska's requirement that a minor provide a written statement indicating that she has consulted her parent or guardian about an abortion. App. at 73. Elizabeth F. was not a minor at the time she filed her complaint, and, thus, neither she nor the class she represents were required to affirm that they had consulted a parent or guardian about the decision to obtain an abortion. Accordingly, Elizabeth F. does not address the parental consultation question. She also does not address the Court of Appeals ruling that Plaintiff-Appellee Ladies Center, Inc., had standing to sue in this action. Other rulings of the Court of Appeals in this case have not been appealed to this Court.

summarily the judgment below because, when the findings of fact of the District Court are viewed in the context of the unequivocal precedent of this Court, the grounds advanced for reversal are so manifestly insubstantial as not to require further argument.

STATEMENT OF THE CASE

The Court of Appeals affirmed the District Court's findings of fact, based upon careful consideration of extensive testimony and exhibits, that the informed consent and waiting period requirements imposed direct obstacles to a woman's decision to abort. Specifically, the Circuit Court cited the District Court's finding that "it would take several hours to 'advise'...a

pregnant woman of all the 'reasonably possible consequences' of abortion, pregnancy and childbirth." App. at 51, 72. Further, the District Court found, as the Circuit noted, that the forty-eight hour waiting period would not only increase the cost and time involved in obtaining an abortion, but also that the "increased risk" to the pregnant woman's health as a result of the delay would be "substantial." App. at 53-54, 72.

SUMMARY OF ARGUMENT

Roe v. Wade, 410 U.S. 113 (1973), and its progeny make crystal clear that the Due Process Clause forbids state regulations which directly interfere with the fundamental right to choose

abortion unless they are narrowly tailored to meet a compelling state interest.

Appellants do not, and could not, challenge the clear findings of fact that the informed consent and mandatory waiting period provisions of Nebraska's criminal abortion control statute impose a direct obstacle to women seeking abortions. Nor do appellants even suggest that these provisions are justified by a compelling state interest. Thus, they virtually concede, as they must, that the statutory provisions are an undue burden and unconstitutional.

In an effort to avoid the inevitable conclusion of unconstitutionality, appellants would divert this Court with confusing and misleading arguments that

the appropriate standard of review should be something other than what it clearly is.

This Court should not abstain from its clear duty to strike down this statute on the basis of appellants' perfectly preposterous interpretation of the provisions.

ARGUMENT

I. THE COURT BELOW PROPERLY SUBJECTED THE STATUTORY ROADBLOCKS TO FIRST TRIMESTER ABORTION TO RIGOROUS SCRUTINY

A. State Regulations Which Interfere With First Trimester Abortions Must Be Subjected to Rigorous Judicial Scrutiny

In Roe v. Wade, 410 U.S. 113 (1973), this Court established that the "right of privacy...founded in the Fourteenth Amendment's concept of personal liberty ...is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." Id. at 153. Because the right to privacy guarantees independence in making certain fundamental decisions about whether or not to bear a child, state regulations interfering with the effectuation of these decisions "may be justified only by a 'compelling state interest'...and ...must be narrowly drawn to express only" that interest. Id. at 155. Laws limiting access "to the means of effectuating" decisions in matters of childbearing receive the same rigorous scrutiny as laws prohibiting the decision

altogether since "access is essential to exercise of the constitutionally protected right." Carey v. Population Services International, 431 U.S. 678, 688 (1977).

This Court has consistently applied the strict test enunciated in Roe v. Wade to state regulations which interfere with the right to choose abortion. Doe v. Bolton, 410 U.S. 179 (1973); Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976). See also Bigelow v. Virginia, 421 U.S. 809 (1975).

Appellants urge that, notwithstanding this Court's unequivocal precedent, regulations inhibiting first trimester abortions should only have to be justified by a rational relationship to a legitimate state interest. Without

conceding that the regulations at issue here bear any rational relationship to any legitimate state interest, appellee submits that such an analysis is completely misguided and wholly unsupported by this Court's decisions.

Appellants mistakenly rely on Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976), to the extent that it upheld a written informed consent requirement. The basis for this Court's holding was the finding of fact that the written consent requirement there did not present a direct obstacle to a woman's decision to have an abortion. Therefore, rigorous review was unnecessary. Id. at 66-67. Danforth explicitly cautioned states against informed consent provisions which "confine the

physician in an undesired and uncomfortable straitjacket in the practice of his profession." Id. at 67 n.8. Here, the Eighth Circuit affirmed the District Court's finding that Nebraska's law, "[b]y refusing to allow the physician an opportunity to tailor this information to the patient,...confines the physician in an unconstitutional straitjacket," thereby unduly burdening women's freedom to choose to terminate their pregnancies. App. at 72, 50-51.

B. This Court's Decisions on Minors' Rights to, and Medicaid Funding for, Abortions Signal No Retreat from the Strict Standard of Review Required in This Case

Appellants also distort this Court's opinions on public funding of abortions and minors' rights to abortions in their effort to create confusion where none exists and to rewrite the applicable constitutional standard.

Neither Maher v. Roe, 432 U.S. 464 (1977), nor Harris v. McRae, ____ U.S. ____, 100 S.Ct. 2671 (1980), affects the level of scrutiny or the ultimate result here. In Maher, this Court upheld a Connecticut statute which withdrew state funding from elective abortions. Finding that women had no fundamental right to state funds for elective abortions, the Court subjected the restriction to only minimal review in the equal protection context. Id. However, Maher made crystal clear that minimal review is not applicable to

this case.

> Our conclusion signals no retreat from Roe or the cases applying it. There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy. Constitutional concerns are greatest when the State attempts to impose its will by force of law; the State's power to encourage actions deemed to be in the public interest is necessarily far broader.

432 U.S. at 475-76.

Harris v. McRae, in which this Court upheld the federal withdrawal of Medicaid funds for most abortions, reiterated the direct interference/funding distinction. 100 S.Ct. at 2686-88. Maher and McRae are both grounded on the finding that governmental failure to

fund abortion simply is not a state-created obstacle to the fundamental right to choose abortion. In both cases, the majority specifically contrasted a funding restriction with the type of state regulation at bar. Neither Maher nor McRae lends an iota of support to appellants' argument that mere minimal scrutiny should be given the challenged statute. In fact, both cases explicitly refute it.

Similarly, this Court's decisions concerning minors' rights to abortion are no help to appellants. A minor's right to choose abortion is not co-extensive with an adult's. Bellotti v. Baird, 443 U.S. 622 (1979).[4/] Accord-

---

4/ Contrary to appellants' assertion in their jurisdictional statement (at p. 11), the District Court did not view the Bellotti decision, or any decision of this Court, as a retreat from Roe v. Wade. App. at 37.

ingly, this Court's decisions on the reproductive freedom of minors reflect different considerations, which apply only to minors because of their youth. That precedent cannot, therefore, be applied to restrictions affecting all women's access to abortion.

This Court's careful scrutiny of laws restricting minors' access to abortion and contraception, notwithstanding the different status of minors, underscores the propriety of rigorous review of regulations inhibiting the right to abortion. Carey v. Population Services International, Inc., 431 U.S. 678 (1977), held that states could not prohibit the sale of contraceptives to minors. Danforth struck down a Missouri law which required parental consent before a minor could obtain an

abortion. In Bellotti v. Baird, 443 U.S. 622 (1979), this Court held unconstitutional even a statutory scheme which provided a judicial alternative to parental consent when it failed to provide a complete by-pass to parental involvement for mature minors and those immature minors whose best interests might be harmed by parental involvement.

In H.L. v. Matheson, 49 U.S.L.W. 4255 (March 24, 1981), this Court upheld a parental notification requirement only to the extent that it affected immature, dependent minors living at home, who do not claim or show that parental notification is otherwise not in their best interest. 49 U.S.L.W. at 4257 and n. 14,

4258.[5] The Chief Justice, in his opinion for the Court, observed that a notification provision "as applied to immature and dependent minors...serves the important considerations of family integrity and protecting adolescents... [and] a significant state interest by providing an opportunity for parents to supply essential medical and other information to a physician." Id. at 4259. (emphasis added) [6]

5/ In his concurring opinion, Justice Powell, joined by Justice Stewart, made clear that H.L. left open "the question whether [a notification requirement] unconstitutionally burdens the right of a mature minor or a minor whose best interest would not be served by parental notification." 49 U.S.L.W. at 4259.

6/ The Chief Justice also noted that, since the Utah statute, as applied to immature, dependent minors whose best interests are not adversely affected by parental notification, does not pose a direct obstacle to the fundamental right to choose abortion, it could, like funding restrictions, be justified by a less than compelling state interest. Id. at 4259.

Thus, it is clear that even with respect to minors, who do not enjoy the same unfettered exercise of the fundamental right to choose abortion as adults, this Court will tolerate state regulations which interfere with the effectuation of the abortion choice only when such laws are narrowly tailored to serve "important" and "significant" state interests.

Similarly, this Court's recent affirmance in Gary-Northwest Indiana Women's Services, Inc. v. Orr, 49 U.S.L.W. 3806 (April 27, 1981), does not counsel any relaxation of the rigorous review required for regulations restricting a woman's decision to abort a pregnancy in the first trimester.

In Gary-Northwest, this Court summarily affirmed the refusal of a three-

judge court to vacate an earlier judgment and issue a preliminary injunction against a regulation affecting second trimester abortions only. The summary affirmance in Gary-Northwest settles only "the issues for the parties" there, "and is not to be read as a renunciation by this Court of doctrines previously announced in [its] opinions after full argument." (footnote omitted) Fusari v. Steinberg, 419 U.S. 379, 391-393 (1975) (Burger, C.J., concurring).

Summary affirmances reject only the specific challenges presented in the jurisdictional statement. Mandel v. Bradley, 432 U.S. 173, 176 (1977). See also Colorado Springs Amusements, Ltd. v. Rizzo, 428 U.S. 913 (1976) (Brennan, J., dissenting). The only

arguably substantive issue presented in Gary-Northwest was "whether the lower court had abused its discretion in failing to issue a preliminary injunction." No. 80-1275, Jur. St. at i (emphasis added). Reversal of the granting or denial of a preliminary injunction requires "a strong showing" that the lower court ruling "was plainly the result of an improvident exercise of judicial discretion." Railway Express Agency v. U.S., 7 L.Ed.2d 432, 434 (1962), quoting United Fuel and Gas Co. v. Public Service Commission, 278 U.S. 322, 326 (1929). "In reviewing...interlocutory relief, this Court...intimate[s] no view as to the ultimate merits..." Brown v. Chote, 411 U.S. 452, 457 (1973). Thus, the summary affirmance in Gary-Northwest has no

precedential value with respect to the standard of review to be applied to abortion restrictions in the first trimester which have been fully heard on the merits. Indeed, this Court has made clear that "a summary affirmance is an affirmance of the judgment only, ...[and]...should not be understood as breaking new ground but as applying principles established by prior decisions to the particular facts involved." Mandel v. Bradley, 432 U.S. at 176. See also Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. 173, 180-181 (1979). Application of established principles to the facts in this case warrants a summary affirmance of the judgment below.

C. Neither Confusion nor Conflict Exists in the Courts Over the Proper Standard of Review

Appellants liberally lace their jurisdictional statement with intimations of confusion in the lower courts over the proper standard of review for state regulations which directly interfere with the right to choose abortion. No confusion exists. The Courts of Appeals and the District Courts unanimously agree with, and uniformly apply, the standard of review set forth by this Court in Roe v. Wade. Planned Parenthood League of Massachusetts v. Bellotti, 641 F.2d 1006, 1014-1015 (1st. Cir. 1981); Charles v. Carey, 627 F.2d 772 (7th Cir. 1980); Mahoning Women's Center v. Hunter, 610 F.2d 456,

460 (6th. Cir. 1979), vacated and remanded on other grounds, ___ U.S. ___, 65 L.Ed.2d 1110 (1980); Planned Parenthood of Memphis v. Alexander, No. 78-2310 (W.D.Tenn., March 23, 1981), slip opinion at 15-17; Margaret S. v. Edwards, 488 F.Supp. 181, 189-190 (E.D.La. 1980); Scheinberg v. Smith, 482 F.Supp. 529, 536-537 (S.D.Fla. 1979); Akron Center for Reproductive Health, Inc. v. City of Akron, 479 F.Supp. 1172, 1197 n.21 (N.D.Ohio 1979);[7/] Women's Commu-

---

7/ Appellants cite Akron, Alexander, and Wolfe v. Schroering, 541 F.2d 523 (6th Cir. 1976), to illustrate their "considerable confusion and conflict" contention. Jur. St. at 10, 13. These cases demonstrate no such thing. First, appellants rely on an earlier decision in the Tennessee case addressing a preliminary injunction, which necessarily involves a lesser standard. Planned Parenthood of Memphis v. Blanton, No. 78-2310 (W.D.Tenn., August 31, 1979). However, since appellants filed their jurisdictional statement, that court, after trial on

[footnote continued]

nity Health Center, Inc. v. Cohen, 477 F.Supp. 542, 545 (D.Me. 1979).

[footnote 7 continued]

the merits, has permanently enjoined the waiting period, applying the proper standard. Planned Parenthood of Memphis v. Alexander, No. 78-2310 (W.D.Tenn., March 23, 1981), slip opinion at 15-17. [Copies of the slip opinions are lodged with this Court.]

Wolfe v. Schroering upheld a waiting period, noting specifically that no claim had been made that the delay burdened the abortion decision. 541 F.2d at 526. In Akron Center for Reproductive Health, Inc. v. City of Akron, the court found, as a matter of fact, that the degree of interference imposed by the twenty-four hour waiting period was simply to "make effectuation of the abortion decision more expensive..." 479 F.Supp. at 1204. The court concluded that "[t]his increase in expense...is not such that the waiting period must withstand a compelling interest test." Id. In sharp contrast, the finding of fact in this case is that the waiting period, as well as informed consent provisions, constitute a direct obstacle, requiring rigorous scrutiny. Moreover, Mahoning Women's Center v. Hunter, decided by the Sixth Circuit after the Akron decision, casts serious doubt on the holding in Akron, which is now on appeal to that circuit.

II. THE TRIAL COURT'S FINDINGS OF FACT ARE NOT CLEARLY ERRONEOUS, ARE NOT CHALLENGED AS SUCH BY APPELLANTS, AND SHOULD NOT BE REVIEWED BY THIS COURT

Appellants do not, and could not, seriously contest the solidity of the District Court's findings of fact, affirmed by the Court of Appeals. Review by this Court of factual findings is appropriate only when such findings are "clearly erroneous." United States v. General Dynamics Corp., 415 U.S. 486, 508 (1974). This Court has stated that "[i]t is not our place...to reappraise the evidence, unless it plainly fails to support the findings of the trier of

facts." Roemer v. Maryland Public Works Board, 426 U.S. 736, 758 (1976). Appellants have neither alleged nor shown that the trial court's findings of fact are "clearly" and "plainly" unsupported by the evidence.

Instead, appellants confuse conclusions of law with findings of fact and simply fail to follow the steps of substantive due process analysis. They question the lower court's "factual finding" that the challenged statutes "unduly burden the right to seek an abortion." Jur. St. at 14 (emphasis added). However, as the Seventh Circuit has articulated, "the term 'undue burden' defines the ultimate constitutional issue, not merely the threshold requirement for strict scrutiny. When describing specifically the burden of

the party challenging a state regula-tion, the Supreme Court has not used the term 'undue.'" Charles v. Carey, 627 F.2d 772, 777 (7th Cir. 1980). The proper due process analysis, which was applied by the court below, is:

> The threshold question whether there is a "burden" or "direct interference" in the pregnancy determination decision requires the plaintiff merely to show the requisite degree of interference. If the interference is sufficiently substantial and not de minimis, the State has to show the compelling basis for the law, that is, that the burden is not "undue" or unjustifiable.

Charles v. Carey, 627 F.2d at 777.

Appellants virtually concede the unconstitutionality of the Nebraska provisions under the heightened standard of review applied by the Court

below and mandated by Roe v. Wade. See Point I, supra. The question they present, framed as an attack on the factual findings, is merely a reiteration of their spurious argument for a lower standard of review in disguise.

III. ABSTENTION IS MANIFESTLY IMPROPER IN THIS CASE

Appellants urge, absurdly, that the court below should have abstained from deciding the constitutionality of the informed consent definition. They offer an implausible construction of the statute which, they say, would render a doctor virtually immune from prosecution if a signed document simply existed. The Court of Appeals rejected appellants' argument. App. at 73. The

District Court had earlier concluded that, "[b]ecause the construction offered by the defendants would strain a plain reading of the provisions in question,...the provisions are not susceptible of this construction in order to warrant deference to the state courts under the abstention doctrine." App. at 44-46 and n.20.

A. The Abstention Doctrine Should Rarely Be Invoked

The abstention doctrine is "an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it." Colorado River Water Conservation District v. United States, 424 U.S. 800, 813 (1976), quoting County of Alle-

gheny v. Frank Mashuda Co., 360 U.S. 185, 188-189 (1959). This Court has "repeatedly warned...that because of the delays inherent in the abstention process and the danger that valuable federal rights might be lost in the absence of expeditious adjudication in the federal court," abstention may be invoked only in narrowly limited circumstances. Harris County Commissioners Court v. Moore, 420 U.S. 77, 83 (1975); Kusper v. Pontikes, 414 U.S. 51, 55 (1973); Baggett v. Bullitt, 377 U.S. 360, 375 (1964).[8/]

8/ The hardships of delay are an important consideration in deciding whether or not abstention is justified. One factor to which the courts have attached significance is the presence of a rule allowing certification of questions directly to the highest state court for prompt resolution. Bellotti v. Baird, 428 U.S. at 150. No such procedure exists in Nebraska.

Abstention is appropriate only where there is an uncertain issue of state law susceptible of a construction by a state court which may avoid or materially alter the constitutional issue involved. Bellotti v. Baird, 428 U.S. 132, 146-147 (1976). See also Procunier v. Martinez, 416 U.S. 396, 402-403 (1974); Lake Carriers Association v. MacMullen, 406 U.S. 498, 511 (1972). This Court has held that in cases

> [w]here...it cannot be fairly concluded that the underlying state statute is susceptible of an interpretation that might avoid the necessity for constitutional adjudication, abstention would amount to shirking the solemn responsibility of the federal courts to "guard, enforce, and protect every right granted or secured by the Constitution of the United

States." Robb v. Connolly, 111 U.S. 624, 637.

Kusper v. Pontikes, 414 U.S. at 55.

B. Appellants' Interpretation Is Patently Absurd and No State Court Would Adopt It

Appellants suggest that the informed consent provision requires only a voluntarily signed document. This, they argue, will set up an irrebuttable presumption that the woman was properly informed, and, therefore, no doctor possessing such a piece of paper could be subjected to prosecution under the challenged statute. This farfetched interpretation would not only frustrate the legislative intent, but would render the statute meaningless. The law requires that the doctor, as well as

the woman, sign the consent form. The only purpose such a requirement serves is to insure that the information was in fact given. Moreover, the asserted legislative purpose of protecting maternal health would only be served if the woman were actually informed.

Appellants themselves cannot rationally or coherently explain reading the statute to remove the requirement that the woman actually receive the requisite information. There would be no point to the statute construed as appellants urge. Indeed, one would "have to wonder why it's even the law." (Trial Transcript, Dr. Orr, p. 374.)

Abstention is equally absurd with respect to §28-343, which requires doctors to report every abortion "pre-

scribed" as well as those performed. Appellants thoroughly mischaracterize the holding below, which did not purport to construe the statute. Jur. St. at 20; App. at 39-41. The District Court struck down this provision on void-for-vagueness grounds, because doctors "would not know how to comply" with the statutory requirement. App. at 41. Indeed, the impropriety of abstention is heightened by the vagueness holding here. This Court has held that abstention is particularly inappropriate "where the vagueness...goes to the obligations imposed by the statute..." Harris County Commissioners Court v. Moore, 420 U.S. at 86 n.9; see also Procunier v. Martinez, 416 U.S. at 401-402 and n.5. No reasonable state court construction could render §28-

343 constitutional.

There is no basis whatever for abstention in this case.

CONCLUSION

In Roe v. Wade, this Court established a rigorous standard of review for state regulations directly interfering with women's access to first trimester abortions. That strict standard must be applied to the Nebraska statutory provisions, which directly interfere with the ability of women to choose and obtain abortions.

This Court should summarily affirm the judgment below, making clear once again that it will tolerate no state-created obstacles to the fundamental right to choose abortion.

Respectfully submitted,

JUDITH LEVIN
Rabinowitz, Boudin, Standard,
Krinsky & Lieberman, P.C.
30 East 42nd Street
New York, New York 10017
(212) OX 7-8640

Attorneys for Appellee
Elizabeth F.